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In the Supreme Court of the United States

OCTOBER TERM, 1981

ANN CLARK LAZZARA, PETITIONER

VERSUS

PLAINTIFFS' LEGAL COMMITTEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GIBSON TUCKER, JR.
RUSSELL J. SCHONEKAS*
710 Carondelet Street
New Orleans, Louisiana 70130
(504) 588-9014

ANN CLARK LAZZARA
204 Huey P. Long Avenue
Gretna, Louisiana 70053
(504) 367-5895

ATTORNEYS FOR PETITIONERS
*COUNSEL OF RECORD

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED

The petitioner is the private contract attorney of plaintiffs who were parties to complex litigation resulting from a mass disaster. Her clients declined to contract with a Plaintiffs' Legal Committee (PLC) formed among the litigants, whereupon, on the court's motion, and over her opposition, she and her clients were ordered into the committee. Petitioner's employment contract with her clients is recognized as a property right by the positive law of the forum state. Title 37, Section 218, Louisiana Revised Statutes. Petitioner continued active representation of her clients throughout the proceedings, except where she had been pre-empted by the committee under the court order. At the close of the case she was ruled into court and had a personal judgment rendered against her (not the clients) for $92,400 as a contribution toward the PLC's fee. The court justified its order and judgment in the name of implicit judicial management power over its own docket and judicial economy.

The questions presented are:

1. Is not the petitioner here suffering the confiscation of her property in the public interest, without adequate and just compensation, in violation of the Fifth Amendment?

2. Can the petitioner be made to pay for the services rendered to her clients, who were themselves unwilling and forced employers?

3. Are not the petitioner's rights and benefits under her contract with her clients substantive rights rather than procedural rights? And are they not then controlled by the law of the forum in this diversity action?

4. Constitutional issues aside, what is the authority by which a Federal Court can visit upon a private contract attorney enforced idleness in the handling of her clients' affairs and then force her to divide her contract fees with other counsel, chosen by the court?

5. What are the standards and rules for forced employer fee-fixing in complex litigation?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NUMBER:

ANN CLARK LAZZARA

v.

PLAINTIFFS' LEGAL COMMITTEE*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Ann Clark Lazzara, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered May 28, 1982.

OPINIONS BELOW

The per curiam order and decree of the Court of Appeals (App. A) is not reported.

There was no formal opinion of the District Court. The transcript of the District Court's oral reasons in adopt-

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*The other parties to this proceeding are the individual attorneys who comprise the Plaintiffs' Legal Committee, who are John J. Cummings, III, A. Remy Fransen, Jr., Wendell H. Gauthier, Russ M. Herman, Stephen B. Murray, Leonard A. Washofsky and James A. Wysocki.

ing the Magistrate's Findings and Recommendations appear as Appendix B, and the Court's judgment is reproduced as Appendix C.

The Magistrate's Findings and Recommendations are attached as Appendix D.

JURISDICTION

The per curiam order and decree of the Fifth Circuit was entered on May 28, 1982. No petition for rehearing was filed. This petition for certiorari is being filed within the prescribed period of 90 days after May 28, 1982. Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall...be deprived of life, liberty, or property, without due process of law...

2. Section 218 of Title 37 of the Louisiana Revised Statutes provides: (See Appendix I)

3. The Manual For Complex Litigation provides: (See Appendix I)

STATEMENT OF THE CASE

On December 22, 1977, a grain elevator owned by the Continental Grain Company exploded. As a result of this disaster, nearly 50 death and personal injury suits were filed in the district court. A Plaintiff's Legal Committee (PLC) was formed, selected by election by a number of the attorneys representing plaintiffs. Those elected were: John J. Cummings, III; A. Remy Fransen, Jr.; Wendell H. Gauthier; Russ M. Herman; Stephen B. Murray; and Leonard A. Washofsky. After the selection of the Committee, most other contract attorneys voluntarily entered into a contract with the Committee calling for the payment to the Committee of 8 per cent of recovery at the conclusion of the cases. Cases of individual Committee members were not subject to the 8 per cent fee. Later, a seventh attorney was added to represent the interests of the Federal Grain Inspection Service survivors.

By order of court entered May 3, 1978, the cases were consolidated and ordered to proceed as Complex Litigation. On the court's motion, a contradictory hearing was held on August 7, 1978, for all counsel to show cause why the PLC should not be appointed by the court under the Manual to represent all plaintiffs and to handle all pretrial activity and to be paid in accord with the agreement previously executed by the majority of plaintiffs and their attorneys. (Appendix E)

This motion was opposed by appellants and after

hearing resulted in recommendations and an order by the district court dated September 11, 1978. (Appendix F)

With the impending settlement of all claims arising out of the Continental Grain Disaster, the PLC moved the Court to award the committee compensation with respect to the claimants represented by Ann Clark Lazzara and Gibson Tucker, Jr. (being Geraldine Ledet Rapp who recovered individually and as tutrix of her children in the amount of $954,585.04; Geraldine Ledet Rapp as administratrix of the estate of Henry A. Rapp in the amount of $16,237.74; Mrs. Thompson P. Gros in the amount of $80,488.49); and against the claimants represented by Allen Berger (being Alvin James Thompson and Ann Feasor Thompson in the amount of $95,208.75).[1]

The PLC advanced as authority for its claim to the award of compensation the order of the Court entered on September 11, 1978. (Appendix G)

An extensive evidentiary hearing was held before Magistrate Carriere, resulting in recommendations which were subsequently adopted by Judge Lansing Mitchell, over objections filed by the appellants, after hearing, and resulting in a money judgment against appellant Lazzara in the amount of $92,400, as a forced fee contribution by her, out of her attorneys' fees, to the PLC. (Appendices B, C and D)

[1] The Berger dispute was settled prior to appeal.

Lazzara appealed. After oral argument on May 26, 1982, the Fifth Circuit Court of Appeals, two days later, in a per curiam opinion affirmed.

REASONS FOR GRANTING THE PETITION

I.

THE CASE INVOLVES A DECISION BY A FEDERAL COURT OF APPEALS OF AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED, BY THIS COURT.

The importance to the Federal Judicial System of the Complex Litigation approach to the handling of massive litigation growing out of a single disaster is, of course, not to be questioned. The burgeoning use of this device in federal litigation would of itself answer any arguments against the utility of this device and its many benefits. But Complex Litigation has become a two edged sword.

For all of the benefits it may bestow on the federal system, it has become a morass of uncertainty of unanswered critical questions to the private contract counsel for/and the individual litigants. We will address some of these problems and pit-falls in detail further on.

First, though, we wish to point out to the Court that this Court has not yet passed on any of the questions we

will present. No Complex Litigation case has been accepted by the Court in a posture which has allowed the Court to expound with the weight of its authority on the way the Manual is to be applied. And still the use of this device is growing by geometrical progressions.

The landmark case remains, as it has been since it was decided in April of 1977, *In Re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Circ., 1977). That case is glaringly unsatisfactory as a guide to the bench and the bar. In the first place the case is not satisfactory as a final expression by *that Court* on the many issues which were discussed, because the decree affirmed part of the district court's decision, vacated part of the decision and remanded the case for further proceedings and then the case settled.

Further, as we will see in the discussion of the application of the *Everglades* opinion to the case at bar, there are ambiguities in *Everglades*, the resolution of which cannot be determined. More than that, the instant case presented out and out contradictions in the way it was handled, with the procedures which appeared to be prescribed by *Everglades*.

All of that, taken with the fact that the same circuit, when presented with the opportunity to clarify the import of *Everglades* in the field of Complex Litigation, more or less "punted" by affirming in a one-line per curiam, we say, presents a situation which crys out for this petition to be granted.

1. The Constitutional Issue

Everglades is silent on this point. Surely it presents a serious question. We see that once Lazzara had contracted with her clients with a written contingent fee contract, she had acquired a valuable property right—one which is recognized by explicit legislation of the forum state. See LSA R.S. 37:218 (Supra). She had the duty and the *right* to perform the services called for in the contract, and to be paid for them according to the contract. Somehow now she finds that $92,400 of her contract is being delivered to the PLC. She never agreed to that arrangement. Both she and her clients rejected any such arrangement when it was offered to her by the PLC when it was in its formative stages. She formally opposed the Court-sponsored motion to force her and her clients to accept the committee's representation.

More than that, the record establishes that she did not "coat-tail". In the Magistrate's recommendations (Appendix D), approved by the PLC and later by the District Court, at page 8, we find in item 18, this opening comment: "During the course of this litigation, respondents, Lazzara and Berger, did not sit idly by while the plaintiffs' committee prepared the case for trial" and the Magistrate goes on to describe some of their activities. Actually, Lazzara testified at length concerning her representation of her clients in every conceivable area left open to her by the court's judgment of September 11, 1978. No one disputes this. Masses of work product were introduced into evi-

dence. Prior to her partial exclusion from her representation of her clients by the court's order, she scheduled and actually took the *first* deposition taken in the entire case.

Everglades justified its holding, that there could be forced representation by the committee, and forced contribution by contract counsel to the committee's fee by commiserating with the system at the district level over its workload, and by extolling the virtues of Complex Litigation in relieving the problem, and the contribution of that device to the greater good of the public interest. But all of this simply aggravates the violation of Lazzara's due process rights. When valuable property rights are taken over by government authority in the interest of the common good, that is expropriation. Payment is demanded by the Fifth Amendment. And all the hearings in the world cannot excuse expropriation *without* payment. The court's decree of September 11, 1978 (Appendix F) coupled with its judgment against Lazzara for $92,400 is confiscatory and unconstitutional.

This aspect of the case brings out one of the unresolved ambiguities in *Everglades*. At page 1019 of the opinion we find the following:

> "One who hires and pays his own lawyer is not a free rider if the attorney is a contributor to the final results. The District Judge recognized this by excluding from the 8% contributions attorneys who continued to be active..."

What does this mean? How does it apply to the instant case?

2. Petitioner Is Being Forced To Pay Twice

Lazzara was a young and inexperienced attorney when her clients employed her. They employed her with full knowledge of these facts. With their approval, she associated her father at the very outset of her employment. Her father was an experienced trial lawyer, a long time Chancery Judge in Hattiesburg, Mississippi, returned to private practice. She paid him $25,000 for his participation, which was continuous, throughout the proceeding.

As the proceedings moved on, and early in the case and long before the appointment of the PLC, she associated an experienced local trial attorney, attorney of record here, whom she will surely have to pay. It is her agreement with her clients, as it should be, that *these* payments will come out of her contingent fee. And so she will have to pay twice. What else could she have done? How could she tell that she was going to be forced to pay a committee? Yet at the same time she knew that she had to augment her meager experience by associating experienced counsel. She should not be forced to pay twice.

II.

THERE IS A CONFLICT BETWEEN THE DECISIONS OF TWO COURTS OF APPEAL.

In *Everglades* and now in the case at bar, the Fifth

Circuit holds that these charges can be made personally against the private attorneys of the clients. The Motion to Award Compensation brought by the PLC (Appendix G) and the judgment of the district court (Appendix C) are levelled at Lazzara and condemn her to pay the PLC $92,400, plus interest.

In a case recently decided by the Court of Appeals, District of Columbia, as yet unreported, a similar decision of the District Court was considered and reversed. In *In Re: Air Crash Disaster Near Saigon*, No. 80-2428, the District Court had established a cost contribution formula. Two of the litigants refused to pay the contribution levied against them, and the District Court levied the costs personally against the attorneys representing the clients, and ruled that the attorneys would be in contempt of court if they did not pay them. But there were no charges of wrong doing or bad faith levelled at the attorneys. The Court of Appeal reversed, holding that the attorneys could not be held for the payment of the clients' costs. It is submitted that attorneys can no more be held to the payment of the clients' attorneys' fees, than they can for the payment of costs.

The three cases appear to be in hopeless conflict and the petition should be granted for this reason.

1. The Instant Case is in Conflict With The Holding in *Everglades*, Itself.

Everglades makes it abundantly clear that the Com-

mittee in that case was the forced representative of the non-contracting claimants *only* to the extent of developing and trying, if need be, *liability* issues.[1] The Court's order in the case at bar, forcing the Lazzara clients into the committee was carefully drawn to accomplish the same result (Appendix F). The Courts attention is directed to the fact that the order is drawn in two parts. The first part deals with the duties of the Committee as they pertain to the representation of their *contract* clients (who were each and every claimant with the exception of Lazzara's and Berger's clients).

It is only on the *last* page of the order that the Court addresses the duties (and authority) of the Committee to represent the *non*-contracting litigants (Lazzara's and Berger's clients). And the authority is patently limited to "discovery, preparation for trial, and trial of all liability issues" for the "plaintiffs, who have not contracted with the Plaintiffs' Legal Committee".

Now the Committee claimed 23,310 hours total. (Appendix D, p.9). Their time-logs demonstrate that literally thousands of these hours were devoted to settlement negotiations, which were beyond their authority as to Lazzara's clients, under the order under which the Committee operated.

It is true, to be sure, that the Lazzara claims were settled at the same time as the contract clients' claims

[1] Many of the claims in *Everglades* had not been settled as to quantum when the *Everglades* decree was entered.

were settled; but this *had to be*. It had to be for two reasons. First, it is the fact, and nobody disputes it, that the settlement offers made by the *Defense* Committee, were *always* on an all or none basis. In other words, *all* of the claims had to settle, or the offers were not valid. And, second, it is the fact that the Defense Committee flatly refused to negotiate the Lazzara claims other than thru the PLC. Such representation as there was of the Lazzara claims then, in the settlement hours of labor was *not* done under the aegis of the court order, and it *had* to be done in order for the PLC to represent all of its own clients.

Everglades does not justify the charges which Lazzara is being forced to pay, herself, for these hours which are beyond the authority of the Committee.

Everglades made it clear that *no* charge could be made for hours expended prior to the Court's order directing the plaintiffs' representation by the Committee. There were a total of 4,419 hours claimed by the Committee for work done *prior* to the Court's order of September 11, 1978 (Appendix F).

Everglades would have required that the fees which the Committee received from their own clients be taken into account in determining the amount of contribution to be exacted from the attorneys who refused to contract with the Committee. The Court said, p. 1017:

> "The principles underlying use of lead and liaison counsel are blurred in this case by the Committee members, having 60 cases of their own. Ap-

pellants ask, 'why pay them for doing what they would have done anyhow on behalf of their own clients?' This is too simplistic. It is uncertain that appellants or any other plaintiff lawyers would have been able to conduct prompt, orderly, precise and fruitful discovery if there had been a multitude of diligent lawyers pushing for the front seat and the maximum advantage. *The Committee members' 60 cases may affect the amount paid them as lead counsel but not the power of the court to require payment.*" (Emphasis added).

In his approved findings the Magistrate found:

21. Applying the principles of *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5 Cir. 1974), and the facts found aforesaid, this Court finds that a fair and equitable hourly attorneys' fee is $100.00 per hour. See: Neely v. City of grenada, (5 Cir. No. 78-1762, August 20, 1980).

There follows a spread display of the monies actually received by each member of the Committee, taken from the records in evidence. It should be remembered that each of the Committee members had their own personal clients with whom they had direct contingent fee contracts, and that these fees went direct to the Committee member involved. These sums appear on the display as "DIRECT CONTRACT FEE". In addition, the individual members participated in the total fees paid to the Committee by all other attorneys than Lazzara and Berger, according to a formula they worked out among themselves, that resulted in the amounts listed under "PLC CONTRACT FEE". The

hours listed under the "HOURS" column is the amount of hours they *claimed* without any editing or discount for any reason.

We see that if the Magistrate had given any account to the payments which the members received from contracting clients, every member of the Committee was already paid in excess of the rate which the Magistrate felt would adequately compensate him, and some of them x 2, 3 and 5.

PLAINTIFFS' LEGAL COMMITTEE
COMPUTATION OF HOURLY RATE OF PLC

PLC ATTORNEY	DIRECT CONTRACT FEE	PLC CONTRACT FEE	FEE TOTAL
Cummings	436,926.96	365,901.68	802,828.64
Fransen	359,906.29	165,396.70	525,302.99
Gauthier	547,105.22	365,901.68	913,006.90
Herman	189,234.48	205,255.74	394,490.22
Murray	309,410.52	205,255.74	514,666.26
Washofsky	622,451.23	134,622.58	757,073.81
Wysocki	276,071.95	99,071.39	375,143.34
TOTALS	2,741,106.65	1,541,405.51	4,282,512.16

PLC ATTORNEY	HOURS	HOURLY RATE
Cummings	6,798.25	118.09
Fransen	1,610.40	326.19
Gauthier	4,317.34	211.47
Herman	3,707.75	106.40
Murray	3,420.06	150.48
Washofsky	1,434.50	527.76
Wysocki	2,024.75	185.28

III.

THE MAGISTRATE'S COMPUTATIONS WERE GRIEVOUSLY AND DEMONSTRATIVELY ERRONEOUS.

We quote from the Magistrate's Approved Recommendations (Appendix D).

> 22. Because of the method by which many of the members of the Plaintiffs' Committee kept their hours and because of the Wysocki reconstruction, this Court cannot with certainty determine the total hours that they expended in this litigation. The Committee claims 23,310 hours. This Court finds that between September 11, 1978, the date the Committee was appointed, to May 5, 1980, the date the order of dismissal was entered, the Plaintiffs' Committee expended 21,000 hours in the prosecution of this litigation.

The "Wysocki Reconstruction" refers to Wysocki's candid testimony that he did not keep contemporaneous time records as he was plainly required to do by the Court's order (Appendix H); and in violation of the detailed recommendations of the Manual for Complex Litigation, para. 1.47, p. 308-309. His total hours were 2,024.75. We have already said that hours claimed for work done prior to the Court order forming the Committee totalled 4,419.

It should also be noted that Washofsky produced *two* sets of time logs, and testified that he had simply inflated the hours he claimed in the second set by adding 300

hours of reconstructed time (which is impermissable) and by inflating the hours he claimed for the same identical activities by 400 hours in preparation for this litigation.

Herman similarly produced *two* sets of time logs, in the second set of which he inflated the time spent for the same activity for a total of 382 hours.

But the commissioner disallowed *only 2,310 hours.* According to his own rules this simply cannot be. He would have to have disallowed 7,525.75 hours.

IV.

THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT ON A FEDERAL QUESTION.

In order to address this reason for allowing the petition for certiorari, the Court will first have to determine whether Lazzara's claim to be paid and to keep the $92,400 of her contract fee, instead of being required to turn it over to the PLC, is a substantive right, as she contends that it is; or whether it is "a federal procedural issue and therefore not subject to the dictates of Louisiana Law" as the District Judge found it to be (Appendix B, p.66). Unquestionably she had the right to be paid the money under her contract and under positive legislation of the forum state. LSA R.S. 37:218. This could not be other than a substantive right. How can it become a procedural right when the

court takes it away from her and gives it to the PLC? No authority is given for the view that this is a procedural right. And the fact that the *Everglades* court, without discussion of the issue, applied the so-called "fund doctrine" is not determinative.

This brings us to Your Honor's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 44 L.Ed. 2d 141, 95 S.Ct. 1612 (S. Ct., 1975).

In *Alyeska*, the Court of Appeals had awarded attorneys fees to the plaintiffs under the equitable powers of the court on the theory that the plaintiffs, an environmentalist group seeking to enjoin construction of a pipeline, were performing the services of a "private attorney general." 421 U.S. 240, 241. The Court of Appeals reasoned that the plaintiffs had acted to vindicate "important statutory rights of all citizens" (under the Mineral Leasing Act, 30 U.S.C. 185) and that they were entitled to attorneys' fees "lest the great cost of litigation deter private parties from seeking the enforcement of the laws protecting the environment." *Alyeska*, p. 245.

The Supreme Court reversed. The Supreme Court analyzed in depth the entire history of fee assessment by federal courts. It concluded its analysis by observing that the general rule, known as the "American Rule" (p. 247) prevails to date and that "...absent *statute* or *enforcable contract*, litigants pay their own attorneys' fees." (p. 257). (Emphasis Supplied).

The court went on to examine certain exceptions to the "American Rule", among them, the "fund doctrine" originating with *Trustees v. Greenough*, 105 U.S. 527. The court cited *Central Railroad & Banking Co. v. Pettus*, 113. U.S. 116; *Sprague v. Ticonic National Bank*, 307 U.S. 161, and *Dawson, Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 Har.L.Rev. 1597.

So far as any general, equitable power on the part of the federal judiciary to fashion awards of attorneys' fees is concerned, the court spoke definitively. With the exceptions mentioned by the court (the "Fund Doctrine") the court repudiated any general, equitable power. Referring to any possible recognition of such a general, equitable power by Congress, the court said:

> "But congressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against non-statutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award." (p. 263).

Significantly, all of these authorities cited in *Alyeska* are ones cited in *Everglades* as "reinforcing" the court's decision that it had the authority to award attorneys' fees as it did. (p. 1017). But *Alyeska* seems to say that they are the *only* authority under which the court could fashion such a decree. It could not do it under the authority of the *Manual*. And the only applicable exception to the "Ameri-

can Rule" recognized in *Alyeska* is the "Fund" doctrine.

At page 258, after referring to *Greenough*, etc., as the only acceptable judicially fashioned exceptions to the "American Rule" the *Alyeska* court said this:

> "These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress, but none of the exceptions is involved here."
>
> "31. A very different situation is presented when a federal court sits in a diversity case. "In an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed."

What *Alyeska* holds, then, so far as the instant proceeding is concerned is that with the exceptions noted in that case, federal courts have no general, equitable powers to deviate from the "American Rule" in fee allocation. And further, that when federal jurisdiction in the cause rests on diversity of citizenship, even the judicially fashioned exception to the "American Rule" (i.e., the "Fund" doctrine espoused in *Greenough* and *Sprague*) is applied *only if it is agreeable to the state statutory law and judicially created rules.*

Prior to the decision in Alyeska, in *Aerosonic Corporation v. Trodyne Corporation*, 402 F.2d 223 (C.A. 5,

1968), the Fifth Circuit had the occasion to put into practice *Alyeska's* conclusions as to the equitable authority of the federal court espoused in *Sprague*, in a diversity case. Pointing out the Florida statute which prohibited assessment of plaintiff's fees against the defendant as an item of damages, absent express statutory authority or contractual provision the court ruled, p. 229:

> "Appellee suggests that the Supreme Court in *Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S.Ct., 777, 83 L.Ed., 1194 (1939), held that allowance by federal courts in equity suits of counsel fees and other expenses entailed by the litigation but not included in the ordinary taxable costs recognized by statute is part of the historic equity jurisdiction of federal courts. It is true that the Supreme Court so held, but it was not considering a diversity case. The litigation involved the liquidation of a national bank under the provisions of an Act of Congress. It is not to be doubted that where the jurisdiction of the federal court is based on the existence of a federal question, federal law applies as to both substance and procedure, *Atlantic Coast Line R. Co. v. Dixon*, 5 Cir., 1953, 207 F.2d. 899, but this is not the rule for diversity cases.
>
> "Since *Erie R. R. Co. v. Thompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1938) it is the law that where federal jurisdiction is based on diversity of citizenship and not on the federal Constitution or some Act of Congress, a federal court is in effect only another court of the state in which it sits and applies the same law that would be applied if the action had been brought in state courts. It follows that in diversity cases the federal courts cannot allow recovery

if the right to recover is denied by the State, and this is true regardless of the form of the action and whether the remedy is sought at law or in equity, *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079, 160 A.L.R. 1231 (1945), rehearing denied 326 U.S. 806, 66 S.Ct. 7, 90 L.Ed. 491. The outcome of litigation in federal court with respect to a state created right should be the same as it would be in the state court, *Guaranty Trust Co. of New York v. York*, supra; *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956). On this line of authority, since attorneys' fees in this case could not have been allowed as such by a state court the United States District Court had no authority to allow them."

How then did this same circuit rule in favor of the fee assessment in *Everglades*? There could be many answers to this question. In the first place no mention is made in the opinion that the case is a diversity case, though it might very likely have been one. This suggests strongly that no mention was made of this question by any of the litigants, and so was not even considered by the court.

A good reason for not mentioning it might have been that the Florida state courts follow the "Fund" doctrine, and would have themselves agreed to such a ruling.

The monies in question here were beyond doubt the property of the plaintiffs under the settlement of their case, and just as clearly were payable by the plaintiffs to respondent Lazzara under her fee contract with the plain-

tiffs. We now see that under the judgment of the court below the monies, plus an additional sum, must be paid to the PLC. These are substantive rights which are involved and they are decided by substantive not procedural law. Under *Alyeska* and *Aerosonic*, in this diversity case, these rights must be determined under the law of Louisiana.

It has not been questioned that Louisiana law has never allowed the imposition of an attorney's fee under the circumstances of this case. The respondents were solicited to agree with the PLC to be represented by them and refused. Their private attorneys proceeded to represent them until the PLC successfully prevailed on the Court to order the PLC into a position where they represented the clients, and invested them with the authority to do so. Thereafter in the representation of their own clients by the PLC, the respondent's claims were reluctantly settled. But there is no authority for the Court to take part of the fees of the contract attorneys and deliver them to the PLC, over the objection of the clients and their contract attorneys under any theory of Louisiana law.

The decision below conflicts with the decision of this court in *Alyeska*.

V.

THE CONFLICT OF INTEREST

This sub-heading of the reasons for granting the peti-

tion for certiorari is really an explicit example of subheading I, which is to say the need of the bench and bar for an expression from the Supreme Court of guidelines in what is fast becoming a real danger in the use of the Complex Litigation approach to the handling of mass disasters.

The dangers of conflicts of interest in such a case as this one are glaringly apparent, when we consider that the Committee members have their own contract clients in whose recovery they participate to the extent of from 33⅓% to 40%. While at the same time there are a majority of litigants in whose recovery they participate to the extent of only 8%.

To avoid the obvious criticism which would follow a lump sum offer in settlement of all cases, with an allocation of the lump sum to the different claims by the PLC, the Plaintiff *Settlement* Committee (three members of the PLC) and the Defense Settlement Committee (DFC) labored mightily in their negotiations to have it appear that the DFC was offering settlement figures, claim by claim.[1] The validity of this ploy loses much of its force, even so, when we consider the fact, and it was a fact, that the DFC *always insisted* that its offers were on an "all or none" basis. Either everybody settled or each and every offer was void. The question naturally arises, "What possible difference could it make to the DFC who got how much?"

[1] The Committees kept near verbatim minutes of their meetings, which were obtained by petitioner under discovery and which were revealing.

However that may be, the case of the claim for Patrick Rapp is illuminating. Patrick died immediately in the explosion. He had no surviving descendants or ascendants, but there were five siblings who survived the explosion, all represented by Committee member Murray.

It happened that he had a sixth sibling, Henry Rapp, who was also killed in the explosion. Under Louisiana Law, if Henry survived Patrick, by so much as an instant, then Henry's claim in Patrick's death would have been on an equal footing with the five other siblings, and would have descended to Henry's children. They were represented by Lazzara.

Now Murray was, in effect, Lazzara's (and her clients') representative on the PLC, because both of the decedents had been employees of an independent contractor working on the building.[1]

There was medical evidence that Henry died a lingering death by suffocation and thus survived his brother, Patrick.

There was a suit by Lazzara and her clients for damages due to Patrick's death.

The DFC consistently denied any substance to this

[1] The categories of the decedents ranged from employees, who were faced with a workmens' compensation defense, to business invitees against whom there could hardly be a defense, each category represented by a particular member of the Committee.

claim on the basis of the Louisiana Law of comorientes. Lazzara kept insisting that comorientes does not apply in wrongful death claims.[2]

The final offer for Patrick's death was $81,368.70. Murray accepted the offer. But somehow, not yet clear, this was all to be paid to *Murray's* clients. Lazzara's clients were to receive *none* of the settlement. Lazzara went direct to the Magistrate. Lazzara's clients received an *additional* share from the DFC dollar for dollar on the same basis as the other (Murray) siblings. Thus, the footnote on page 9 of Appendix D.

While it is true that the Magistrate excluded the $16,000 received in the Lazzara settlement from his fee allocation formula, it is also true that she paid for every one of Murray's 3,420 claimed hours, for this masterful attention to her clients' interests.

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[2] She was correct. *Collins v. Becnel*, 297 So.2d 506.

CONCLUSION

The petition for certiorari should be granted and the judgment against the petitioner should be vacated and the motion and rule should be dismissed.

Respectfully Submitted,

GIBSON TUCKER, JR.
RUSSELL J. SCHONEKAS*
710 Carondelet Street
New Orleans, Louisiana 70130
(504) 588-9014

ANN CLARK LAZZARA
204 Huey P. Long Avenue
Gretna, Louisiana 70053
(504) 367-5895

ATTORNEYS FOR PETITIONERS
*COUNSEL OF RECORD

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-3076

ALBERT NELSON,

Plaintiff,

versus

CONTINENTAL GRAIN, ET AL.,

Defendants.

****

PLAINTIFF'S LEGAL COMMITTEE,

Plaintiff-Appellee,

versus

ANN CLARK LAZZARA,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(May 28, 1982)

Before CLARK, Chief Judge, POLITZ and RANDALL, Circuit Judges.

PER CURIAM:

The district court correctly applied Re: Air Crash Disaster at Florida Everglades, 549 F.2d 1006 (5th Cir. 1977). The district court's findings of fact were not clearly erroneous.

AFFIRMED. See Local Rule 21.

APPENDIX "B"

THE COURT:

The District Court has inherent power to conduct its docket in the manner most economic, in terms of time and effort for itself, counsel and litigants. A Court may order consolidation despite opposition of parties to avoid overlapping procedures. The District Court has authority to authorize a lead committee to conduct settlement negotiations.

The non-contracting parties only attended a few depositions at the beginning of the litigation, as I understand from what Magistrate Carriere found. Their activity was limited to preparing estimates of their clients' quantum of damages. Essentially that's what their activities were.

The degree of representation performed by the Plaintiffs' Legal Committee on behalf of the non-contracting plaintiffs cannot be accurately determined since the defendants conceded liability on all the claims prior to discussion of individual claims. Therefore, it was unnecessary to allocate the amount of time spent on each plaintiff. Ms. Lazzara's plaintiff's recovery was only 4.4 percent of the whole, and Berger's was .4 percent, as nearly as I can figure it. The time consumed in segregating these specific recoveries would only serve to thwart judicial economy. The Magistrate's findings of fact are not clearly,

I repeat, are not clearly erroneous.

The appointment of the Plaintiffs' Legal Committee was an act of Federal procedural significance and not on the issue of substantive law. Therefore, Federal and not Louisiana law applies in this Court's opinion.

Now, the Plaintiffs' Legal Committee relies heavily—all of the arguments boil down to whether or not the Court will accept the Magistrate's findings of fact and recommendations.

Now, with regard to the law to be applied, Counsel Lazzara and Berger argue that this is a diversity case, and therefore, Louisiana Law applies. They argue the "Common Fund" doctrine does not apply under Louisiana Law.

Now, the Plaintiffs' Legal Committee relies heavily on the *In Re: Air Crash Disaster at Florida Everglades, 549 Fed 2nd 1006,* decided by the Fifth Circuit Court of Appeals of the United States in 1977.

Now, the *Everglades* case involves one hundred fifty claims for death and injuries arising out of a crash of an Eastern Airlines plane crash in the Everglades in Florida. Although it is not stated, it appears to the Court that the suit was filed on the basis of diversity jurisdiction.

The Court appointed a Plaintiffs' Committee to represent some sixty plaintiffs. The extensive discovery and pre-trial preparation was carried on by the Committee

which was largely responsible for the concession of liability and the subsequent settlement of many of the cases.

The Court awarded compensation to the Committee for their work as lead counsel by ordering each other attorney representing a plaintiff, except those who had actively participated in the pre-trial activity, to pay the Committee a part of the fee he or she was entitled to receive from his or her client.

Now, the Court in the *Everglades* case sent a proposed stipulation to all parties suggesting they agree to a consolidated test trial on liability, which also contained a provision concerning a payment of a fee to the Committee. Not all of the plaintiffs joined in the stipulation.

Now, while the parties were negotiating settlement, the Court set a hearing on attorney's fees and awarded the Committee a fee of eight percent of the settlement obtained by each plaintiff out of the fee of that plaintiff's attorney.

The Florida Judge's rationale was threefold:

(1) To achieve the goals of multi-district litigation;

(2) To compensate the Committee for work done beyond that necessary for their own clients, and

(3) the "equitable fund" doctrine.

The Judge in the *Everglades* case found the Commit-

tee's approach was a necessary incident to the achievement of the goals of multi-district litigation, and I stress that, he found "The goal of the expeditious processing of all actions arising from a common disaster each claim for relief being a potentially protracted case, can only be accomplished by avoiding duplicitous discovery conflicting contemporaneous ruling by coordinate district and appellate court and fostering the convenience of parties and witnesses."

The United States Court of Appeals for the Fifth Circuit noted a trial court has managerial power described as "the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.

"We face the hard necessity that, within proper limits, judges must be permitted to bring management power to bear upon massive and complex litigation to prevent it from monopolizing the services of the court to the exclusion of other litigants." And if this was ever a case where this applies, it certainly, in this Court's opinion, applies here.

The Court stated that the trial court's managerial powers are especially strong and flexible in matters of consolidation. Federal Rules of Civil Procedure 42(a) provides in part, "The Court may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delays." He may order consolidation despite the opposition of the parties, despite the opposition of Ms. Lazzara and

Mr. Berger.

A Federal Court in a complex, consolidated case may designate one attorney or set of attorneys to handle pretrial activity on aspects of a case where the interests of all co-parties coincide, says *MacAlister v. Gulermo, 263 Fed 2nd 65*, decided by the United States Court of Appeals for the Second Circuit in 1958.

The Manual for Complex Litigations sets out recommended procedures for complex cases. It does not create rights or bind judges to its procedures.

Section 1.90 of the Manual provides for the appointment of liaison counsel to represent a group of parties. That section states:

> "It is recommended that in appropriate cases the order of appointment make provision for reimbursement of liaison counsel not only for expenses but also for such services as he may render at the request of or pursuant to the order of the Court."

Now, the Everglade Court found Section 1.90's recognition of power in the Court to order compensation to one titled liaison counsel carrying the more significant duties and responsibilities of lead counsel.

The Fifth Circuit found the District Court had the power to direct the Committee and its counsel to be compensated and that requiring the payment from other at-

torneys was permissible.

The Court's rationale was first, that if lead counsel are to be an effective tool, the Court must have means at its disposal to order appropriate compensation for them. The Court found such assurances are necessary to protect the interests of all the parties.

The Court rejected the argument that lead counsel who personally represent some of the claimants are paid twice for the same work, as is the contention of Mr. Berger and Ms. Lazzara. The Court found the lead counsel's services are in part for all parties with like interests and their lawyers. To a degree, lead attorneys become officers of the Court. By making manageable litigation that otherwise would run out of control they serve interests of the Court, the litigants, the other counsel, and the Bar and of the public at large, who are entitled to their chance at access to unimpacted courts.

As an additional ground, the Court found its power to order compensation was reinforced by the body of law concerning the equitable power of the Court to allow counsel fees and litigation expenses out of the proceeds of a fund that has been created, increased or protected by successful litigation. The rationale behind these cases is that it is fair to require payment by those who accepted the fruit of the labor of others, and if anybody ever accepted the fruit of the labor of others, it was Mr. Berger and Ms. Lazzara.

The Court recognized this disaster case was not a traditional equitable fund case. This case involves larger interests, whose vindication commands affirmative intervention by the Court and the assignment of additional responsibilities to some attorneys, inuring to the benefit of other attorneys, as it did in this case.

The Fifth Circuit in *Everglades* has recognized the need for employing complex litigation techniques in large disaster cases. It appears that the Fifth Circuit is encouraging District Judges to employ new procedures to minimize the judicial time and effort concentrated in these complex cases. The manner in which the Court appoints lead counsel and how they will be compensated is a Federal procedural issue and therefore not subject to the dictates of Louisiana substantive law. If that be treason make the most of it, Ms. Lazzara and Mr. Berger.

The Court in *Everglades* did not go into any discussion with regard to Florida law in discussing how the issue of attorney's fees would be determined.

Now, Ms. Lazzara and Mr. Berger are complaining about the factual findings of the Magistrate with regard to the amount awarded the PLC out of their recovery.

A Special Master's findings, as was the Magistrate in this case, he was a Special Master, ought to be adopted by the District Court unless the findings are on their face clearly erroneous. A finding is not erroneous unless the

reviewing Court is left with a definite and firm conviction that a mistake has been made. So says *Paper Converting Machinery Company, Inc., v. FMC Corporation, 432 Fed Supplement 907, affirmed 588 Fed 2nd 832 in 1977.*

The Magistrate held a hearing for several days, as counsel for the Committee pointed out, on the hours worked by the individual PLC members.

Now, several days it took the Magistrate's Court because of the complaining parties here, Mr. Berger and Ms. Lazzara.

The Magistrate was very familiar with with work going on in this case, and I, the Court, believe was in the best position to determine the accuracy of the time records kept by these lawyers. It would have been impossible, I think, to assess the exact amount of time allocated to each individual plaintiff as suggested by Ms. Lazzara and Mr. Berger. the issue of liability was never actually litigated. It was through the efforts of the PLC that the defendants decided to concede liability and settle the case. Obviously the non-contracting parties benefitted from the work of the PLC. Under the circumstances, this Court feels that it shouldn't penalize the PLC because the records don't specifically reflect the amount of time spent on each liability issue. Such a requirement doesn't fit into the context of complex litigation.

Counsel suggests and the Magistrate recognizes

that they continued to participate in the work after the PLC was appointed. However, there is no allegation that they participated to the same degree as the PLC members, because I don't think they would have the temerity to say so. This Court is aware of the constant court appearances, the extensive depositions taken and the thousands of documents filed by the Plaintiffs' Legal Committee. I don't believe the participation by the above two individuals, namely, Ms. Lazzara and Mr. Berger should result in the reduction of their contribution to the PLC for the work it did on behalf of their clients.

Now, with regard to Ms. Lazzara's contention that the PLC acted in concert with defense attorneys to lower the value of her client's settlement, the Court agrees with the Magistrate's findings that each class of plaintiffs were treated equally in the final settlement formula as determined by Judge Rubin.

The Magistrate points out that Lazzara's clients who were not Continental Grain employees received the benefits contained in the Continental Grain Union Contract. She should be thankful for that.

It appears that her clients received a better settlement than if they had individually pursued their claim.

So this Ccurt believes that the formula used by the Magistrate was fair and based on competent evidence, and hereby adopts the Findings and Recommendations of the

Magistrate and deny the motions of Ms. Lazzara and Mr. Berger.

Take your appeal.

APPENDIX "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT NELSON	CIVIL ACTION
VERSUS	NO. 78-19
CONTINENTAL GRAIN COMPANY	SECTION "F"

JUDGMENT

The Court having considered the evidence presented, the argument of counsel, and the law applicable to the case; accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Plaintiffs' Legal Committee and against Ann Clark Lazarra in the amount of NINETY-TWO THOUSAND FOUR HUNDRED DOLLARS ($92,400.) and against Allen Berger in the amount of EIGHT THOUSAND, FOUR HUNDRED DOLLARS ($8,400.) with interest from the date of judgment.

New Orleans, Louisiana, this 26th day of January, 1981.

/S/LANSING L. MITCHELL
UNITED STATES DISTRICT JUDGE

APPENDIX "D"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT NELSON	**CIVIL ACTION**
versus	**NUMBER 78-19 and Consolidated Cases**
CONTINENTAL GRAIN COMPANY, ET AL	**SECTION "F" (2)**

SPECIAL MASTER'S FINDING AND RECOMMENDATION

Pursuant to the Order of Reference of the Honorable Lansing L. Mitchell, United States District Judge, this matter was referred to the Honorable James D. Carriere, United States Magistrate, for the purpose of conducting an evidentiary hearing to calculate an attorneys' fee.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On December 22, 1977, a grain elevator owned by the Continental Grain Company exploded. As a result of this disaster, nearly 50 death and personal injury suits were filed in this District. In accord with prior practice in

*The District Judge must decide whether he has authority to tax an attorneys' fee against respondents. Further, after the completion of the Court ordered Certified Public Accountant audit, a hearing must be held on the pro rata expenses demanded by the Plaintiffs' Legal Committee from Respondents.

both state and federal courts in this area, a Plaintiffs' Legal Committee was formed for the purpose of conducting discovery and preparing the consolidated cases for trial.** Members of the Committee were selected by election by the attorneys representing plaintiffs. Those elected were: John J. Cummings, III; A. Remy Fransen, Jr,; Wendell H. Gauthier; Russ M. Herman; Stephen B. Murray; and Leonard A. Washofsky. Each of these were able and experienced attorneys primarily engaged in personal injury litigation. After the selection of the Committee, most other attorneys voluntarily entered into a contract with the Committee calling for the payment to the Committee of 8 percent of recovery at the conclusion of the cases. Cases of individual Committee members were not subject to the 8 percent fee. Later, a seventh attorney was added to represent the interests of the Federal Grain Inspection Service survivors.

2. Respondent, Ann Clark Lazzara, graduated from law school and was admitted to practice in the State of Louisiana in the summer of 1977. A few months after her admission to the bar, she undertook the representation of various claimants in the Continental Grain cases. She attended and participated in the Plaintiffs' Legal Committee's organizational meetings and, in fact, held herself out for election to membership on the Committee. After the Committee was formed, she refused to enter into a contractual relationship with the Committee. The same

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**See McKeithen v. S/S Frosta, Consolidated Cases No. 76-3251-C, E.D.La.; Holm v. Tenneco, Consolidated Cases No. 28-793, 25th J.D.C.

holds true for respondent, Allan Burger, who was admitted to practice in this Court in 1975.

3. In early 1978, the District Court entered an order requiring that the Plaintiffs' Legal Committee conduct all pre-trial discovery and trial preparation on liability issues. See: In *Re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5 Cir. 1977). The District Court reserved the right to set a fee to be paid by non-contracting respondents at the conclusion of the litigation. In order to provide a partial support for the calculation of a fair fee, the members of the Committee were ordered to keep "comprehensive time records" of their activity as Committeemen.

4. After two and one-half years of intense litigation, these consolidated Civil Actions were the subject of negotiated settlements totaling in excess of $23,500,000.00.

5. The Lazzara represented cases settled as follows: Rapp widow/children for death of husband/father, $954,000.00; Gros 80 year old mother for loss of son, $80,000.00; Rapp estate for death of brother, $16,000.00. Her *Ledet* case for death of a fiance was prosecuted by her in state court and was lost on a pre-trial motion on legal grounds. *Ledet v. Continental*, 380 So.2d 655 (4 Cir. 1980). Therefore, by the time of settlement, this case in federal court had no settlement value and was voluntarily dismissed on behalf of plaintiff, Ledet. The Berger represented Thompson case settled for $95,000.00 for the death of a son.

6. Leonard Washofsky testified as follows: He was the attorney for various plaintiffs in the Continental Grain case and was elected a member of the Plaintiffs' Legal Committee. His clients were Continental Grain employees or their survivors. Pursuant to this Court's order of August 18, 1978, he kept contemporary time records of his Committee activities, the summary of which accounts for 1301 hours expended on these cases. Exhibit R24. He adjusted these hours for the purpose of this hearing to include 300 hours for the reading of mail, pleadings and literature related to these cases. In addition, there were upward adjustments for travel time of some 400 hours to include departure to return time as opposed to working time. Exhibit P-12; Compare Exhibits R24 to P12 on 7/10-12/78, 9/17-18/78, 11/3-10/78, 11/13-16/78, 12/3-6/78, 3/25-28/79, 4/2-3/79, 5/19-24/79, 9/16-20/79, 11/14-15/79. His adjusted time records totaled 2024 hours. From his personal clients in these cases, he received contingent fees of $622,000.00. To date, he received $122,000.00 as his share of the Plaintiffs' Legal Committee fees.

7. James Wysocki testified as follows. He was the attorney for a plaintiff in the Continental Grain case and was elected as a supplemental member of the Plaintiffs' Legal Committee. His clients were the survivors of a Federal Grain Inspection Service employee. He did not keep contemporary time records of his Committee activities. In June, 1980, in anticipation of the attorneys' fee hearing in these cases, he reconstructed time records by referring to his calendars and the Court's minute entries and docket

sheets. He adjusted these reconstructed hours to include 296 hours for the reading of mail, pleadings and literature related to these cases. Exhibit P-14; 11-A. His adjusted time records totaled 1,434 hours. From his personal clients in these cases, he received a contingent fee of $276,000.00. To date, he has received $90,000.00 as his share of the Plaintiffs' Legal Committee fees.

8. Stephen Murray testified as follows. He was the attorney for various plaintiffs in the Continental Grain cases and was elected a member of the Plaintiffs' Legal Committee. His clients were independent contractor employees or their survivors. Pursuant to this Court's order of August 18, 1978, he kept contemporary time records of his Committee activities, a summary of which accounts for 3420 hours expended on these cases. Exhibit P-7. From his personal clients in these cases, he received contingent fees of $310,000.00. To date, he has received $190,000.00 as his share of the Plaintiffs' Legal Committee fees.

9. A. Remy Fransen testified as follows. He was the attorney for various plaintiffs in the Continental Grain cases and was elected a member of the Plaintiffs' Legal Committee. Pursuant to this Court's order of August 18, 1978, he kept contemporary time records of his Committee activities, a summary of which accounts for 1610 hours expended on these cases. Exhibit P-15. From his personal clients in these cases, he received contingent fees of $247,000.00. To date, he has received $158,000.00 as his

share of the Plaintiffs' Legal Committee fees.

10. Russ Herman testified as follows. He was the attorney for various plaintiffs in the Continental Grain cases and was elected a member of the Plaintiffs' Legal Committee. Pursuant to this Court's order of August 18, 1978, he kept contemporary time records of his Committee activities, a summary of which accounts for 3707 hours expended on these cases. Exhibit P-6. From his personal clients in these cases, he received contingent fees of $189,000.00. To date, he has received $200,000.00 as his share of the Plaintiffs' Legal Committee fees.

11. John J. Cummings, III testified as follows. He was the attorney for various plaintiffs in the Continental Grain cases and was elected a member of the Plaintiffs' Legal Committee. Pursuant to this Court's order of August 18, 1978, he kept contemporary time records of his Committee activities, a summary of which accounts for 6798 hours expended on these cases. Exhibit P-5. From his personal clients in these cases, he received contingent fees of $434,000.00. To date, he has received $350,000.00 as his share of the Plaintiffs' Legal Committee fees.

12. Wendell H. Gauthier testified as follows. He was the attorney for various plaintiffs in the Continental Grain cases and was elected a member of the Plaintiffs' Legal Committee. Pursuant to this Court's order of August 18, 1978, he kept contemporary time records of his Committee activities, a summary of which accounts for 4317 hours ex-

pended on these cases. Exhibit P-9. From his personal clients in these cases, he received contingent fees of $420,000.00. To date, he has received $235,000.00 as his share of the Plaintiffs' Legal Committee fees.

13. In summer, 1979, at the request of most plaintiffs and all defendants, Circuit Judge Alvin B. Rubin undertook the mediation of the settlement of these cases. The lone dissenting voice to Judge Rubin being mediator was respondent Lazzara through her attorney Gibson Tucker. Before he withdrew from his roll as mediator, Judge Rubin fixed certain amounts which would be paid in settlement of various elements of each claim. For example: loss of love and affection by surviving spouse, $85,000.00; loss of love and affection by surviving child age 0-12, $50,000.00; loss of love and affection by surviving child age 13-17, $35,000.00; loss of love and affection by surviving child age over 18, $25,000.00; loss of love and affection by surviving parent, $40,000.00; loss of love and affection by surviving siblings, $15,000.00; conscious pain and suffering in death case, $7,500.00. He also set a one time potential for promotion add on of 10 percent and personal consumption deductions of 20 or 30 percent depending on the average age of the surviving children. Judge Rubin arranged for the services of an economist, William Landes, who eventually fixed a net discount figure of 1.2 percent taking into consideration potential investment income and inflation. Judge Rubin's figures were utilized in the final formula wherein each case was settled. For the most part, each plaintiff and each class of plaintiffs were treated

equally in the final settlement formula. For example, each non Continental employee was given the advantage of the benefits contained from the Continental Grain Union contract. Each was given a 12 percent raise over the 1977 base for 1978, a 13 percent raise for 1979 and an additional 10 percent for loss of fringe benefits. In other words, respondent Lazzara's clients, the survivors of non Continental employees, directly benefited by having their claims settled within the same formula context as the claims of Continental employees' survivors. Respondent Berger represented the parents of a deceased Continental employee.

14. This Court finds that the $954,000.00 Rapp settlement and the $80,000.00 Gros settlement negotiated by the Plaintiffs' Legal Committee on behalf of respondent Lazzara's clients and the $95,000.00 Thompson settlement negotiated on behalf of respondent Berger's client exceed the judgment value of these claims as reflected in reported decisions in state and federal cases within this District and in the State of Louisiana. *Canter v. Koehring*, 283 so.2d 716 (1973); *Barr v. Louisiana*, 355 So.2d 52 (2 Cir. 1978); *Aymond v. Louisiana*, 333 So.2d 383 (3 Cir. 1976); *Blanchard v. Rodrigue*, 340 So.2d 1001 (1 Cir. 1976); *Billiot v. Bourg*, 338 So.2d 1148 (1976); *Matthews v. Standard Life*, 213 So.2d 128 (3 Cir. 1968); Moore v. Travelers, 352 So.2d 270 (2 Cir. 1977); *Bryant v. Travelers*, 307 So.2d 749 (1 Cir. 1975). These settlements represent outstanding, ultimate dollar values.

15. This Court finds that there were legal impediments to a direct recovery in the Rapp and Gros cases against Continental Grain Company. Louisiana Revised Statutes, 23:1061, provides that a non employee may be limited to compensation recovery if the non employee was engaged in performing a job within the trade, business, or occupation of the tort defendant. Since Continental Grain Company had a maintenance crew which on occasion performed painting work, it is arguable that Rapp and Gros, employees of an independent painter contractor, were statutory employees of Continental Grain and their recovery against Continental was limited to workmen compensation benefits. See: *Sisk v. I.N.A.*, 356 So.2d 1109 (2 Cir. 1978). Given the contested facts on this issue, it is doubtful whether a successful summary judgment motion could have been urged by any party.

16. Respondent Lazzara claims that her clients' "lock, absolute liability, res ipsa" cases against Continental grain entitled them to a bonus settlement above the Continental employees' settlement. This position is frivolous. Respondent Lazzara and her clients were not forced to compromise their claims. At the end of this litigation, defendants were prepared to collectively admit liability and try any plaintiff's quantum claim. In fact, respondent Lazzara could not risk trial of the $954,000.00 Rapp case because the $954,000.00 was derived from a formula tied to the Continental Grain union contract plus fringe benefits whereas Rapp's employer was non union and provided no fringe benefits. Furthermore, Rapp's $30,000.00

income in 1977, as calculated by Mrs. Lazzara, was out of line with his reported $12,000.00 per year income in prior years. In other words, the $954,000.00 Rapp settlement was greatly in excess of the judgment value of the Rapp case standing alone.

17. It is appropriate for this Court to comment on the overall accomplishments of the Plaintiffs' Legal Committee. For two and one-half years the Committee developed extensive evidence against numerous defendants. Defendants who contributed varying sums to the final settlement are: Continental Grain Company and certain of its individual executive officers; R. S. Fling, Inc., the elevator's design engineer; CEA-Carter Day, the manufacturer of the grain dust collection system; LeGardeur International, Inc., MacDonald Engineering Inc. and Weitz Company, general contractors who built various structural components of the elevator; Orleans Electric Contractors, Fegles Power Service, Inc., H. A. Williams & Associates, subcontractors and their engineers who worked on parts of the elevator; Degesch Gm bH, Phostoxin Sales, Inc., and Industrial Fumigant, chemical anti pest fumigant manufacturers and suppliers. Millions of documents were reviewed, videotaped and catalogued for use at trial. The Committee participated in over 125 days of depositions, hundreds of discovery motions and filed and amended suits on behalf of 51 separate plaintiff interests in Louisiana as well as in six other federal jurisdictions. This Court personally observed the activity of the Committee members during numerous conferences as well as during weekly mo-

tion hearings on the various discovery issues. The Committee was always prepared and the Court was particularly impressed with the Committee's leadership and professional demeanor.* The result produced by the Committee clearly speaks in favor of its skill and dedication to the successful resolution of this complex litigation. The Committee was relentless, and proved that the District Court made a proper decision to entrust the representation of all plaintiffs to these men.

18. During the course of this litigation, respondents, Lazzara and Berger, did not sit idly by while the Plaintiffs' Committee prepared the cases for trial. Both frequently advised and counseled their clients and performed gratis legal work for them. Both prepared first class settlement brochures for presentation to the defendants' settlement Committee. At the beginning of the deposition schedule, both on occasion attended discovery depositions being taken by the Plaintiffs' Legal Committee. See: Exhibit Respondent 41, 42 and Berger 1.

19. By contract, the recovery on each Committee member's personal cases was not subject to the eight percent fee assessed against the recovery on non Committee member's cases. Given this fact, this Court feels that it would be inappropriate to merely assess the eight percent

*The failure of one member of the Committee to maintain contemporaneous time records does not detract from the skillful accomplishments of the Committee as a whole throughout this novel and difficult litigation.

fee against respondents' cases merely because that is what was done contractually in the other cases.

20. This Court finds that the fairest method of calculating a fee would be as follows. The Court will compare respondents' clients' recovery to the total recovery of all plaintiffs and will calculate the percentage of their recovery to the whole recovery. This percentage will then be multiplied times the Plaintiffs' Committee's acceptable hours. This product will be multiplied by an appropriate hourly rate and the result will be the attorneys' fee to be paid by respondents to the Plaintiffs' Committee.

21. Applying the principles of *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5 Cir. 1974), and the facts found aforesaid, this Court finds that a fair and equitable hourly attorneys' fee is $100.00 per hour. See: *Neely v. City of Grenada*, (5 Cir. No. 78-1762, August 20, 1980).

22. Because of the method by which many of the members of the Plaintiffs' Committee kept their hours and because of the Wysocki reconstruction, this Court cannot with certainty determine the total hours that they expended in this litigation. The Committee claims 23,310 hours. This Court finds that between September 11, 1978, the date the Committee was appointed, to May 5, 1980, the date the order of dismissal was entered, the Plaintiffs' Committee expended 21,000 hours in the prosecution of this litigation.

23. Lazzara Fee Calculation. $1,034,000 received by her clients* divided by $23,500,000 received by all plaintiffs equals .044 times 21,000 Committee hours equals 924 times $100 per hour equals a $92,400 attorney's fee to be paid by respondent Lazzara to Plaintiffs' Committee.

24. Berger Fee Calculation. $95,000 received by his clients divided by $23,500,000 received by all plaintiffs equals .004 times 21,000 Committee hours equals 84 times $100 per hour equals a $8,400 attorney's fee to be paid by respondent Berger to Plaintiffs' Committee.

RECOMMENDATION

If the District Judge finds respondents are legally obligated to pay an attorneys' fee to the Plaintiffs' Legal Committee, it is recommended that the attorneys' fee be fixed at $92,400 to be paid by Ann Clark Lazzara and $8,400 to be paid by Allan Berger.

New Orleans, Louisiana, September 5, 1980.

/S/JAMES D. CARRIERE
JAMES D. CARRIERE
United States Magistrate

*The $16,000 received in settlement by the Rapp estate for the death of brother is not included in this sum because this case settled solely because of the effort of Ms. Lazzara with the intervention of this Court.

APPENDIX "E"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT NELSON	CIVIL ACTION
versus	NUMBER 78-19 and Consolidated Cases
CONTINENTAL GRAIN COMPANY	SECTION "F" (2)

RULE TO SHOW CAUSE

All parties are to show cause on July 31, 1978, at 2:00 P.M. before United States Magistrate James D. Carriere, why, in these consolidated Civil Actions, the Court should or should not appoint the presently-constituted "Plaintiff's Committee" as counsel to handle all the pretrial activity of these cases with compensation for these services to be paid in accord with the agreement previously executed by the majority of plaintiffs and their attorneys. Memoranda to be filed by July 24, 1978.

New Orleans, Louisiana, June 22, 1978.

/S/JAMES CARRIERE
JAMES D. CARRIERE
United States Magistrate

APPENDIX "F"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT NELSON	CIVIL ACTION
versus	NUMBER 78-19 and Consolidated Cases
CONTINENTAL GRAIN COMPANY, ET AL	SECTION "F" (2)

ORDER

IT IS ORDERED that a Plaintiffs' Trial Committee shall prosecute the liability issues of these consolidated cases on behalf of all personal injury plaintiffs.

This committee shall consist of the following members:

Mr. John J. Cummings, III
Attorney At Law
416 Gravier Street
New Orleans, LA 70130

Mr. A. Remy Fransen, Jr.
841 Carondelet Street
New Orleans, LA 70130

Mr. Wendell H. Gauthier
3213 Florida Avenue, Suite 100
Kenner, LA 70062

Mr. Russ M. Herman
1010 Common Street, Suite 505
New Orleans, Louisiana 70112

Mr. Stephen B. Murray
612 Gravier Street
New Orleans, LA 70130

Mr. Leonard A. Washofsky
1411 Decatur Street
New Orleans, LA 70116

Mr. James A. Wysocki
1410 First National Bank of Commmerce Building
New Orleans, LA 70112

The committee's duties and responsibilities shall be:

A. To conduct liability discovery on behalf of all personal injury plaintiffs who have filed civil actions in this Court.

B. Initiate, brief and argue motions and, when necessary, oppose motions and proceedings initiated by any or all of the defendants on liability matters.

C. Enter into stipulations with liaison counsel for any and all defendants regarding the liability phase of these cases.

D. Act as spokesmen at court conferences, subject to the right of any attorney for each plaintiff to appear at the conferences and present individual or divergent positions.

E. Prepare periodic status and progress reports and mail them to the attorney for each plaintiff.

F. Maintain files of all pre-trial liability matters and have them available for examination by the attorney for any plaintiff.

G. Collect from plaintiffs, through their counsel, including claimant's represented by committee members, the sum of FIVE HUNDRED AND NO/100 ($500.00) DOLLARS per claim. With regard to the death cases, a claim is intended to refer to each decedent. These amounts are to be used to defray costs expended by the committee in connection with the carrying out of duties and responsibilities imposed on it. These funds are to be deposited in a checking account and a periodic report of costs and disbursments shall be given to counsel for each plaintiff. This sum may be supplemented by court order as the need arises.

H. To cause to be issued all subpoenas for all witnesses and documents for the pre-trial and trial of the liability phase of these cases and to conduct the trial of the liability phase of these cases.

I. To marshal information and supporting documents pertaining to the damage aspect of each claim.

J. To assist each individual plaintiff's attorney in the preparation of the damage aspect of these cases as re-

quested by the individual plaintiff's attorney.

K. To discuss settlement figures with the defendants for recommendation to the attorney for each plaintiff.

L. To do all those acts required to accomplish the above including the hiring of experts and support personnel.

M. No member of the Committee may withdraw from the Committee or his duties herein without court approval.

N. To elect and substitute a committee member with court approval when a vacancy occurs due to the illness or inability to act.

O. To represent fairly not only the interests of the Committee and the plaintiffs as a whole but each individual plaintiff and each particular class of plaintiffs.

P. The Committee is so constituted that each class of plaintiffs (employees of Continental; contractors; Federal employees; business invitees; claimants pursuant to Maritime Law or Federal Statute; claimants for State or Federal compensation and/or Social Security Benefits; claimants for Longshoreman and Harbor Workers compensation; claimants for wages; claimants for injuries and/or wrongful death and/or survival actions; claimants pursuant to Federal Tort Claims Act) is represented by a member of the Committee and in order to avoid conflicts of

interest it shall be the duty of the Committee to see to it that at all times during the course of litigation that each class of plaintiff has a representative on the Committee to represent that class of claimants' best interest, including presence during discovery.

Q. To file administrative claims pursuant to the Federal Tort Claims Act on behalf of each plaintiff.

IT IF FURTHER ORDERED that the above named Trial Committee will supervise and coordinate the prosecution of the cases of plaintiffs, who have not contracted with the Plaintiffs' Legal Committee, for the purposes of discovery, preparation for trial, and trial of all liability issues. These plaintiffs are ordered to pay a pro rata share of expenses of the litigation pursuant to paragraph G of this order. The compensation to be awarded to the members of the Committee on the cases of the plaintiffs who have not contracted with the Plaintiffs' Legal Committee will be set by the court at the conclusion of the litigation. The fee will be based upon all relevant circumstances and will be contingent upon recovery in tort, with no fee due the Committee for any sums recovered in Compensation or Social Security Benefits.

New Orleans, Louisiana, this 11th day of September, 1978.

/S/LANSING L. MITCHELL
UNITED STATES DISTRICT JUDGE

APPENDIX "G"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT NELSON	CIVIL ACTION NO. 78-19
VERSUS	SECTION "F" (2)
CONTINENTAL GRAIN CO., ET AL	CONSOLIDATED CASES

****

MOTION TO ADOPT SPECIAL MASTER'S FINDING AND RECOMMENDATION

NOW INTO COURT, through undersigned counsel comes the Plaintiffs' Legal Committee and moves the Court pursuant to Federal Rules of Civil Procedure 53 (e)(2) for an order compelling respondents, Ann Clark Lazzara and Allan Berger to pay an attorney's fee to the Plaintiffs' Legal Committee, and adopting the Findings of Fact and Recommendations of the Special Master filed herein September 5, 1980 for the reasons more fully set forth in the accompanying memorandum.

Respectfully submitted:

/S/STEPHEN B. MURRAY

PLAINTIFFS' LEGAL COMMITTEE/
CONTINENTAL GRAIN DISASTER
John J. Cummings, III
A. Remy Fransen, Jr.
Russ M. Herman
Wendell H. Gauthier
Stephen B. Murray
Leonard A. Washofsky
James A. Wysocki

APPENDIX "H"

MINUTE ENTRY
AUGUST 18, 1978
CARRIERE, M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT NELSON — CIVIL ACTION

versus — NUMBER 78-19 and Consolidated Cases
CONTINENTAL GRAIN COMPANY, ET AL — SECTION "F" (2)

Commencing this date, each member of the plaintiffs' committee will maintain comprehensive time records concerning all activity devoted to the prosecution of plaintiffs' causes of action.

/S/JAMES CARRIERE
JAMES D. CARRIERE
United States Magistrate

APPENDIX "I"

§ 218. Contract for fee based on proportion of subject matter; stipulation concerning compromise, discontinuance or settlement

By written contract signed by his client, an attorney at law may acquire as his fee an interest in the subject matter of a suit, proposed suit, or claim in the assertion, prosecution or defense of which he is employed, whether the claim or suit be for money or for property. In such contract, it may be stipulated that neither the attorney nor the client may, without the written consent of the other, settle, compromise, release, discontinue or otherwise dispose of the suit or claim. Either party to the contract may, at any time, file and record it with the clerk of court in the parish in which the suit is pending or is to be brought orwith the clerk of court in the parish of the client's domicile. After such filing, any settlement, compromise, discontinuance, or other disposition made of the suit or claim by either the attorney or the client, without the written consent of the other, is null and void and the suit or claim shall be proceeded with as if no such settlement, compromise, discontinuance, or other disposition had been made.

Amended by Acts 1975,No. 670, §1.

1.47 Sample Order Directing Counsel to M ain Contemporary Records of Time Spent in Potential Class Action.

The above styled action has been filed as a potential class action in which the plaintiff seeks to act as the representative of a class of persons "so numerous that joinder of all members is impracticable," within the meaning of Rule 23(a)(1), F.R.Civ.P. In order for counsel representing the plaintiff class to be awarded attorney's fees as the class counsel, it is necessary that they maintain "contemporary time records, kept on a day-to-day basis" of the time spent by them in this action, *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 382 F.Supp. 999, 1011 (E.D.Pa. 1974), affirmed in pertinent part, 540 F.2d 102, 109 (3d Cir. 1976), with specific descriptions of the activities of each attorney for all of the time recorded. *Lindy Bros. Builders, Inc., of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973). Reconstructions of expenditures of time are not a sufficient basis for an award of attorney's fees. *Id.*

It is therefore

ORDERED that the attorney seeking to represent the potential class in this action maintain contemporary, day-to-day records revealing specifically what activities were performed by each attorney and the time spent by h..m in each activity and that such records continue to be maintained after any class certification and until the con-

clusion of the action by class counsel. It is further

ORDERED that the records being maintained by the attorneys in accordance with this order be produced at each pre-trial conference held in this action for inspection by the court.

Dated this_____day of_____, 19 __ .

_____
JUDGE